IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.719 OF 2004

1. Vasantraodada Patil Sahakari)
Sakhar Karkhana Ltd.)
Vithewadi (Lonar) Tal. Deola)
Dist. Nasik.)

2. Dr.Daulatrao Sonuji Aher)
The Chairman of the Petitioner)
No.1, Age Adult R/o Deola,)
Dist. Nasik.)

3. Vinayak Rajaram Baste)
Managing Director of the)
Petitioner No.1, Age Adult,)
R/o Karkhana Site, Vithewadi)
Tal.Deola, Dist. Nasik.)... Petitioners

Versus

1. Union of India, through)
Ministry of Consumer Affairs,)
Food & P.D. Deptt. Of Food)
& Public Distribution, Krishi)
Bhavan, New Delhi 110 001.)

2. The Chief Director of Sugar)
having his office at Krishi)
Bhavan, New Delhi -110 001.)

3. The Chief Supdt. of Central)
Excise & Customs)
Malegaon Range, Nasik-III)
Div. Market Road Camp,)
Malegaon.)

4. The Dy. Commissioner, Central)
Excise & Customs, Nasik III)
Div. Kendriya Rajas Bhavan)
Old Agra Road, Gadkari)
Chowk, Nasik.)

5. The State of Maharashtra)

through Coop. & Textile Dept.)
Mantralaya, Mumbai.)

6. The Commissioner of Sugar)
Maharashtra State, Sakhar)
Sankul, Shivaji Nagar, Pune-5)

7. The Collector Nasik)

8. The Tahsildar, Ta. Deola,)
Dist. Nasik)

9. M/s. Jai Jagdish Sugar)
Prop. Mr. Deepak Thakker)
having its office at Shop)
No.8, Paras Bafana Market,)
Opp. Nagarpalika, Dhule,)
Maharashtra State.)

10. The Police Inspector,)
Satana Police Station,)
Satana, Dist. Nasik.)...Respondents

Mr.C.J.Sawant with S.N.Bhadrashete for Petitioners

Mr.D.N.Salvi for Respondent Nos.1 to 4

Mr.D.S.Mhaispurkar, for State

WITH

CRIMINAL WRIT PETITION NO.722 OF 2004

Dongrai Sagareshwar Shetkari)
Sahakari Sakhar Karkhana Ltd.)
Kadepur (Raigaon), Tal. Kadepur)
Dist. Sangli through its Chairman)
Shri Purthaviraj Deshmukh)
age : adult, Occupation ;)
Agriculture, R/at. Kadepur,)
Dist. Sangli.)...Petitioner

Versus

1. The Chief Director (Sugar))
Ministry of Consumer Affairs)
Food and Public Distribution)
Department, Government of)
India, Krishi Bhavan,)
New Delhi.)

2. The Director (Cost),)
Ministry of Consumer Affairs)
Food & Public Distribution)
Department, Government of)
India, Directorate of Sugar,)
Krashi Bhavan, new Delhi.)

3. The Union of India)

4. The Commissioner of Sugar)
Maharashtra State, Pune.)

5. The Collector, Sangli)
District Sangli.)

6. The Special Auditor No.1)
Cooperative Socieites (Sugar))
Kolhapur.)

7. The State of Maharashtra)

8. M/s. Shiva Marketing Ltd.)
5-5 Commerce Centre, Tardeo,)

Bombay 400 034.)...Respondents

Mr.R.V.More for Petitioners

Mr.R.F.Lambay for Respondent No.1 to 3

Mr.D.S.Mhaispurkar, APP for State.

CORAM : R.M.S.KHANDEPARKER &
P.V.KAKADE, JJ.

DATE : 9th FEBRUARY, 2005.

ORAL JUDGEMENT : (Per Khandeparkar, J.)

1. Pursuant to the order dated 24th June 2004 and considering the issue involved in the mattes, the same were directed to be heard for expeditious disposal and therefore since August last the matters were being heard for final disposal.

2. Since common questions of law and facts arise in both the Petitions they were heard together. As observed above, the petitions were in fact heard on number of occasions giving ample opportunities to the parties on both the sides to putforth their contention

in the matter. The Respondent No.9 in Writ Petition No.719 of 2004 and Respondent No.8 in Writ Petition No.722 of 2004 though served have not appeared before the Court. They are the purchasers and exporters in relation to the sugar lifted by them from the respective petitioners - producers and who have allegedly diverted the sugar released for export to the domestic market.

3. The grievance of the Petitioners in both the petitions is that the authorities empowered to prosecute the persons committing default in relation to the use of controlled commodity viz. the sugar are trying to prosecute the petitioners without any fault on their part and inspite of the fact that there appears to be lapse on the part of the concerned authorities to take appropriate steps at appropriate time to avoid misuse of the sugar and therefore, it requires necessary directions by this court for proper investigation in the matter to identify the real culprits in the matter.

4. It is not in dispute that under specific orders issued in accordance with the provisions of Essential Commodities Act, 1955 and the orders passed thereunder the specified quantity of sugar was directed to be

released to the respondent no.9 in Writ Petition No.719 of 2004 and Respondent No.8 in Writ Petition No.722 of 2004 for the purpose of export of the said quantity of the sugar and such directions were issued to the respective petitioners, who are the producers of the sugar. It is also not in dispute that pursuant to the said directions the specified quantity of sugar was released by the petitioners in favour of the respective respondents. As regards the petitioner in Writ Petition No.722 of 2004 is concerned only a quantity of 1231.5 metric tone of sugar was delivered to the respondent No.8 therein. The correspondence placed on record further disclose that the entire quantity of sugar lifted by the said respondents instead of being exported, it was diverted for consumption in the domestic market. It appears that in case of Respondent No.9 in Writ Petition No.719 of 2004 such a diversion of the product in domestic market was done pursuant to the alleged permission obtained from the Central Excise and Customs Officers. There does not appear to have obtained the necessary permission from the authority who is empowered to deal with the disposal of the sugar which is a controlled commodity under the Essential Commodities Act, 1955. The affidavit in reply filed by

the Respondents also nowhere discloses any such permission having been granted by the concerned authorities under the said Act for such diversion of the sugar to the domestic market instead of export thereof. Undisputeldy, the utilisation of the control commodity under the provisions of the said Act has to be in accordance with the permission granted by the authorities under the said Act. Rule 9 of Sugar (Control) Order, 1966 (No.G.S.R. 912-ESS.Com.-Sugar, New Delhi, dated the 10th June 1966/20th Jyaistha 1888) provides that where any person, class or person or organisation takes delivery of sugar from any producer in pursuance of a direction made under clause (f) of sub-section (2) of Section 3 of the said Act, such person or class of persons or organisation, as the case may be, shall utilise the sugar so delivered for the purpose for which such delivery has been taken and for no other purpose, and submit to the Chief Director within fifteen days of the utilisation of the sugar so taken delivery of a certificate to the effect that the sugar has been utilised for the purpose for which it was taken delivery of. Obviously, therefore, the utilisation of the sugar of which the delivery is taken in pursuance of the order issued under Section 3 of the

said Act has to be in accordance with the Order issued by the authority for the purpose of utilisation of the sugar. In the case in hand the respondents had obtained the sugar in pursuance of the said provision of law i.e. under Section 3(2)(1) of the said Act for the purpose of export thereof but the same was utilised for domestic consumption. Prima facie, there appears contravention of the provisions of law.

5. The further grievance of the Petitioners is that inspite of the default on the part of the exporter of the sugar, the Petitioner are sought to be prosecuted for the alleged default without any connivance of the petitioners with the purchasers. The Petitioners therefore seek to quash letter dated 8.12.2003 issued by the Chief Director (Sugar) and the letter dated 12.1.2004 issued by Sugar Commissioner of Maharashtra State, Pune, in Writ Petition Nos.719 of 2004 and 722 of 2004 respectively. Perusal of the said letters apparently disclose that the Collector is sought to be directed to initiate prosecution for violation of the condition of the release order in relation to the sugar as the exporter has utilised the sugar for the purpose other than for which it was released and that it amounts

to contravention in terms of release under Rule 9 of Sugar (Control) Order 1966 read with Section 3 of the said Act. As already stated above apart from mere allegation, there is nothing placed on record to disclose, even prima facie, that the petitioners had acted in connivance with the said exporters for the purpose of misutilisation of the sugar which was released for the purpose of export or in the matter of diverting the said sugar for domestic consumption instead of export thereof.

6. Rule 9 of the Sugar (Control) Order apparently discloses that a person who takes delivery of the sugar in pursuance of a direction issued under Section 3(2)f) of the Act has to submit to the Chief Director of Sugar within 15 days of the utilisation of the sugar so taken delivery of a certificate to the effect that the sugar has been utilised for the purpose for which it was taken delivery of. Clause (i) thereof clearly requires to utilise the sugar so taken delivery of for the purpose for which such delivery was taken and for no other purpose. There is ample power available to the authorities under the said Act and the said Sugar (Control) Order to seek information and to carry out the

inspection and search in case of non compliance of the provision of law or whenever there is reason to believe that there has been misutilisation of sugar or violation of the direction issued under Section 3(2)(f) of the said Act. Inspite of repeated opportunities being given to the Respondents, they have not placed on record any material disclosing any such action having been taken by them at any point of time to avoid misutilisation of the sugar, which was released for export and not for the domestic consumption. There is no explanation on record as to why prompt action was not taken by the concerned authorities at appropriate time to avoid such misutilisation of the sugar by the exporters. Undoubtedly, the sugar is a perishable commodity and being so when the provisions of law clearly warrant the authorities to take appropriate steps against the persons who violate the provisions of law, it is expected from such authorities to be prompt in exercise of their powers as also their duties to avoid such misutilisation of the control commodities. The carelessness and carefree attitude on the part of such authorities could defeat the very purpose for which the provisions under the Essential Commodities Act are made and orders are passed thereunder from time to time.

Being so, it is also necessary for the authorities to be alert in ensuring the proper implementation of the provisions of law comprised under the said Act and particularly in respect of the controlled commodities.

7. It is really surprising that the commodity which is a controlled one in accordance with the provisions under Essential Commodities Act and in relation to which specific powers are given to the Officers under the said Act and various order passed thereunder, the authorities did not seem to have discouraged the violation of the provisions of law under the said Act and the Orders and allowed the Exporter to misutilise the sugar for the purpose different than for which it was released. This is prima facie apparent from the copies of the correspondence placed on record which reveal letters from the Office of Central Excise and Customs Department. It appears that Respondent no.9 in first Writ Petition was allowed to divert the sugar which was meant for export, to domestic consumption by the officers of the Central Excise and Customs. In that regard it is the contention of the respondents that such permission was granted in accordance with the provision of Government Notification No.42/01 CE(N.T.) dated

26.6.2001. Perusal of the said Notification discloses that the same was issued in exercise of powers conferred by Sub-Rule 3 of Rule 19 of the Central Excise (No.2) Rules, 2001 whereunder the Central Board of Excise and Customs had notified the conditions and procedure for export of all excisable goods, except to Nepal and Bhutan without payment of duty from the factory of the production or the manufacture or warehouse or any other premises as may be approved by the Commissioner of Central Excise. At the same time our attention is drawn to clause (v) which speaks of cancellation of applications for export. Sub clause (a) of clause (v) provides that if the excisable goods are not exported, the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise or Maritime Commissioner or such other officer as authorised by the Board on this behalf, as the case may be, to whom the bond or letter of undertaking has been furnished, may, on written request for cancellation of application, cancel said application and allow diversion of goods for consumption in India subject to the sub-para (b). Sub-clause (b) of clause (v) provides that the exporter shall pay the duty as specified in the application along with interest at the rate of twenty four per cent per

annum on such duty from the date of removal for export from the factory or warehouse or any other approved premises till the date of payment of duty. Obviously, the provision of law comprised under the said notification are to ensure proper collection of revenue in relation to the commodities which are exported out of India and those which are meant for export but actually not exported. The relevant clause is in relation to the power of the authority to allow the parties to cancel the application for export and divert the product which is meant for export for the purpose of home consumption. That by itself, however, nowhere provides that it will have overriding effect as regards the provision of law comprised under the Essential Commodities Act and orders passed thereunder in relation to controlled commodities. The provision of Customs Act and Central Excise Act and rules thereunder and various notification issued thereunder are in relation to the revenue to be collected in relation to the commodities manufactured and exported out of India. The provision did not relate to the utilisation of the controlled commodities to which the Essential Commodities Act and Orders passed thereunder apply. Irrespective of permission to cancel the application for export and payment of duty in terms

of sub-clause (b) of clause (v) of the said Notification that by itself will not entitle the Exporter to divert the sugar which was released for the purpose of export and not domestic consumption, unless necessary permission in that regard is obtained from the concerned authorities under the Essential Commodities Act and the Orders passed thereunder. In fact once it is known to be a controlled commodity, it was also necessary for all the other authorities acting under the various provisions of law to ensure that the provisions of the Essential Commodities Act and the orders passed thereunder are duly complied with before granting the application for diversion of the controlled commodities in local market. Needless to say that we are not pronouncing the judgment to the effect that Customs or Excise Department would have the power of officers under the Essential Commodities Act. We are only pointing out that it is always duty of every employee of the Government to discourage illegalities and violations of the provisions of law and in that respect it would be obligation of the officers from the Customs and/or Central Excise Department while exercising their powers under the statute governing them to ensure that in the process of exercise of their duties under the said

statutory provisions, the same does not lead to violation of the provisions of another statute. Certainly in that regard it is the duty of each Government Officer to be alert and to perform their duties to the best of their ability to discourage illegalities and therefore, while allowing the diversion of the controlled commodity like sugar for domestic consumption, it is necessary to ensure that such permission for diversion of the commodity for domestic consumption does not result in violation of provision of other statute. Prima facie, no such precaution appears to have been taken by the authorities under the Customs and Central Excise Act in the case in hand.

8. It was sought to be argued on behalf of the Respondents that petitioners have acted in connivance with the exporters for diverting the sugar to the domestic consumption instead of exporting the same. In that connection in relation to Writ Petition No.719 of 2004 attention is drawn to the Agreement between the Petitioners and the exporter wherein there is a clause which reads thus :

"Should any quantity of sugar out of the

> quantity supplied by the seller and accepted by the exporter, under this contract not exported for any reasons what so ever, beyond the control of the exporter e.g. cargo shut out by the vessel. Rejected or short cargo etc. The buyer will have the right to sell sugar in the domestic market however seller shall demand the difference towards additional realisation Buyer/Exporter agrees for the same."

Referring to the said clause it was sought to be contended that there was connivance between the petitioners and Respondent No.9 in the said petition in relation to diversion of the sugar for domestic consumption instead of exporting the same and therefore the Petitioner is also liable to be prosecuted for violation of clause 9 of the Sugar (Control) Order 1966.

9. Undoubtedly the agreement dated 30th October, 2001 between the Petitioners and the said Respondent No.9 discloses the above referred clause. It is also a matter of record that release order was issued on 20.10.2000 prior to the execution of the said agreement. It is also a matter of record that the agreement relates

to 5500 metric tones of sugar and the release order is also in relation to 5500 metric tones of sugar. Prima facie, therefore it may appear that there was connivance between the petitioners and the Respondent No.9 for the purpose of misutilisation of the sugar which was released by diverting the same for domestic consumption instead of exporting. However perusal of the record particularly the letters written by the Petitioners one after another to the various authorities reveal that the Petitioner had been consistently complaining of failure on the part of the respondent NO.9 to cooperate with the petitioner to disclose the utilisation of the sugar for which it was released. Such letters are to be found to have been written by the Petitioner right from 26.12.2001 onwards till 22.6.2002 wherein consistently the petitioner had been complaining of failure on the part of the Respondent no.9 to disclose to the petitioner about the actual export of the sugar which was collected by the respondent no.9 from the petitioner in pursuance of the release order issued on 25.10.2001. This prima facie discloses absence of connivance between the petitioner and the Respondent no.9. As regards the petitioner in Writ Petition No.722 of 2004 apart from mere allegation that the petitioner is also responsible,

the respondents have not placed on record any material so as to disclose the Petitioner’s connivance with the respondent No.8 therein in the matter of diversion of sugar for domestic consumption instead of exporting the same.

10. Considering the above narrated facts and the materials placed on record it is apparent that matter needs investigation in detail before proceeding to take any action against the petitioners as such or any other person or officer. The commodity which is meant for export and that too the Control Commodity was obtained with specific order for the purpose of export and it was not exported but used for domestic consumption without necessary sanction in that regard from the competent authority and in violation of the provisions of law particularly under Rule 9 of the Sugar (Control) Order 1966. These illegal activities had occurred in the year 2001 and yet the authorities apart from writing letters did not take any concrete step nor have taken appropriate action against the defaulters. It is necessary to investigate as to whether the Officers of the concerned Departments are also involved in the matter. Such an investigation is required to be made by

independent agency having experience in the field of investigation and therefore, we direct the District Magistrate of Nasik in relation to the matter in Writ Petition No.719 of 2004 and the District Magistrate, Sangli in relation to Writ Petition No.722 of 2004 to enquiry into the matter in detail and then to proceed to take appropriate action in accordance with law and also to submit the report thereof to this court within a period of eight weeks. We make it clear that this enquiry shall not come in the way of the prosecution if launched or intended to be launched against the respondent No.9 in first Petition and Respondent No.8 in second Petition for the violation of provisions of law comprised under Rule 9 of the said Order or under any other provision of law. At present there shall not be any prosecution against the petitioners herein for the alleged violation of the condition of the release order and therefore the impugned letters directing the Collector to lead prosecution against the petitioners for the alleged offence are hereby quashed and set aside being premature. The petitions as far as the relief against the prosecution of the petitioners is concerned are disposed of with no order as to costs.

. For the purpose of report by the District Magistrate, the matter to be fixed on 28th April, 2005.

(R.M.S.Khandeparkar, J.)

(P.V.Kakade, J.)

...